"where the act complained of is wholly *ultra vires* the company or association the rule has no application because there is no question of the transaction being confirmed by any majority. It has been further pointed out that where what has been done amounts to what is generally called in these cases a fraud on the minority and the wrongdoers are themselves in control of the company, the rule is relaxed in favour of the aggrieved minority who are allowed to bring what is known as a minority shareholders' action on behalf of themselves and all others. The reason for this is that, if they were denied that right, their grievance could never reach the court because the wrongdoers themselves, being in control, would not allow the company to sue."

The appellant's case so far as it is based on the first exception was argued on the basis that the amount of the judgment debt represents capital which the company has no power to reduce. The answer to this is that paragraph 5 of the Memorandum clearly gives the company power to increase or reduce capital. I am not, however, convinced that the judgment debt is capital. Plainly the effect of the resolution is that the company would have to write-off half of the judgment debt and taxed costs and the question is whether it has the power to do this. In my view it has. The Third Schedule to the Companies Act, 1965 which applies by reason of section 19(1)(c) and also by reason of paragraph 3(22) of the Memorandum sets out the powers of the company in addition to those mentioned in the Articles. The powers in paragraphs 12 and 21 of the Schedule seem wide enough to authorise the company to act in terms of the resolution. On the question of illegality, it has not been shown that the said action is illegal under the Act. For these reasons I respectfully agree with the learned trial judge that the resolution is not *ultra vires* or illegal.

On the second exception the appellant has submitted that the resolution not being *bona fide* for the benefit of the company as a whole is a fraud on the minority. In *Allen* v. *Gold Reefs of West Africa, Limited*[3] Lindley M.R. said on page 671:

"Wide, however, as the language of section 50 is, the power conferred by it must, like all other powers, be exercised subject to those general principles of law and equity which are applicable to all powers conferred on majorities and enabling them to bind minorities. It must be exercised, not only in the manner required by law, but also *bona fide* for the benefit of the company as a whole, and it must not be exceeded."

The expression "*bona fide* for the benefit of the company as a whole" in the context stated would seem to mean something more than writing-off bad debts as in this case. What is beneficial to the company as a whole is usually a matter for the shareholders to decide. Largely it is a matter of opinion. Where opinions differ, as might well be the case here, the opinion of the majority must, of course, prevail. This is because the minority have by their contract with the company agreed to submit to the will of the majority. In the instant case and other similar cases it is not always easy to know as a fact whether or not a particular resolution is or is not *bona fide* for the benefit of the company as a whole in order to establish that it is a fraud on the minority. The practical approach to this problem was formulated by Evershed M.R. in *Greenhalgh* v. *Arderne Cinemas Ltd. and Others*[4] when he said on page 1126 thus:

"Certain things, I think, can be safely stated as emerging from those authorities. In the first place, it is now plain that '*bona fide* for the benefit of the company as a whole' means not two things but one thing. It means that the shareholder must proceed on what, in his honest opinion, is for the benefit of the company as a whole. Secondly, the phrase, 'the company as a whole' does not (at any rate in such a case as the present) mean the company as a commercial entity as distinct from the corporators. It means the corporators as a general body. That is to say, you may take the case of an individual hypothetical member and ask whether what is proposed is, in the honest opinion of those who voted in its favour, for that person's benefit. I think the thing can, in practice, be more accurately and precisely stated by looking at the converse and by saying that a special resolution of this kind would be liable to be impeached if the effect of it were to discriminate between the majority shareholders and the minority shareholders so as to give to the former an advantage of which the latter were deprived. When the cases are examined where the resolution has been successfully attacked, it is on that ground that it has fallen down. It is, therefore, not necessary to require that persons voting for a special resolution should, so to speak, dissociate themselves altogether from the prospect of personal benefit and consider whether the proposal is for the benefit of the company as a going concern. If, as commonly happens, an outside person makes an offer to buy all the shares, *prima facie*, if the corporators think it is a fair offer and vote in favour of the resolution, it is no ground for impeaching the resolution because they are considering the position of themselves as individual persons."

This was also the approach adopted by the learned trial judge in the instant case. Whatever may have been stated by him in coming to his conclusion, I think it is impossible to say that the resolution, as it stands, has the effect of discriminating between the majority shareholders and the minority shareholders to the detriment of the latter. There is nothing in the resolution which can suggest that the majority shareholders being in control of the company were taking advantage of their position to deprive the minority shareholders of their individual rights of membership. The minority shareholders' action in *Greenhalgh's*[4] case failed even though the special resolution complained of there would seem to discriminate against the minority. On the view which I take of the resolution in the present case, it must be held that it is not a fraud on the minority. The learned trial judge was right in his conclusion and this appeal must, therefore, be dismissed with costs here and below.

Ong Hock Sim and **Raja Azlan Shah F.JJ.** concurred.

Appeal dismissed.

Solicitors: *Lim Kean Chye & Co.; Yook Woon & Yeow; Mahendran & Co.*

CHIK BINTI ABDULLAH v. ITAM BINTI SAAD

[F.C. (Suffian C.J., Ali and Raja Azlan Shah F.JJ.) April 27, 1974]

[Alor Star — Federal Court Civil Appeal No. 18 of 1974]

Land Law — Contract for sale of land — Claim for specific performance — Conflicting equities.

In this case the land in dispute belonged to one Abdullah bin Mohamed. After his death his widow, Mek, became administratrix of his estate. She entered into an agreement to sell the land to the respondent, for $150 which she had previously borrowed from her. After the death of Mek, the appellant became the administratrix *de bonis non* of the estate. The respondent claimed specific performance of the contract of sale but this was resisted by the appellant on the ground

that the land had previously been sold by oral agreement to Salim, the respondent's husband, who had since died. The learned trial judge allowed the claim for specific performance and the appellant appealed to the Federal Court.

Held, dismissing the appeal: (1) even if it was true that Salim had an equitable interest in the land, nevertheless as the respondent was the first to come to court to seek specific performance, she was entitled to it, if she proved her case;

(2) in the circumstance the learned trial judge was right in ordering specific performance of the contract of sale.

Cases referred to:-

(1) *Noordin bin Mat Dom* v. *Yahaya bin Mohamad Jalit* [1952] M.L.J. 16.

(2) *Munah* v. *Fatimah* [1968] 1 M.L.J. 54.

FEDERAL COURT.

Karpal Singh for the appellants.

A. Jayadeva for the respondent.

Suffian C.J.: The land in dispute belonged to the late Abdullah bin Mohamed. Despite his death in 1926 it is still registered in his name. After his death leaving a widow Mek binti Jusoh and a daughter Chik binti Abdullah the defendant (appellant before us), the widow became administratrix of his estate. Apparently she had spent some money on her husband's funeral.

On 29th May, 1948, after she had extracted letters of administration to Abdullah bin Mohamed's estate, she entered into a written agreement (Exhibit P2) with Itam binti Saad, the plaintiff (respondent before us), selling the land in dispute to Itam for $150 which she had previously borrowed from Itam to pay some one who had lent her money to pay for Abdullah bin Mohamed's funeral.

Mek died in 1953 without winding up the estate, and in 1964 her daughter Chik binti Abdullah became administratrix *de bonis non.*

Chik on 29th June, 1964, obtained a High Court order for distribution of the estate in her favour and also in favour of the baitulmal, but at the material time Itam was in possession of the land as well as of the title deed, neither of which she agreed to surrender to Chik.

On 16th September, 1964, Itam who had caveated the land sued Chik in her capacity as administratrix for specific performance of the agreement of sale, and against Chik in her personal capacity for a declaration that Chik is a trustee of the land for her.

Chik resisted the claim and counterclaimed for the removal of the caveat and for possession of the land and of the grant.

The learned trial judge allowed the claim and dismissed the counterclaim.

Chik appeals to this court.

There were many issues at the trial court, but here before us there remains only one issue: is the written agreement (Exhibit P2) enforceable by the plaintiff?

It is argued on the defendant's behalf that as there was evidence that the late Abdullah bin Mohamed had previously sold this land (by an oral agreement) to Jusoh, the plaintiff's father-in-law, and there was evidence that subsequently Mek had sold it (by a written agreement, Exhibit P3) to Salim (the plaintiff's husband), the agreement of sale (Exhibit P2) was not enforceable by the plaintiff and therefore the plaintiff's claim should have been dismissed. It is said that under Exhibit P3, Salim became equitable owner of the land, that only he or his estate has a right to the land; and that Mek could not have subsequently sold the land to anybody; that by purporting to sell it to the plaintiff, she (Mek) cheated Salim; and that Abdullah bin Mohamed's estate cannot be held liable.

No authorities were cited for this argument.

With respect I do not think that there is any merit in this argument. Before the filing of this suit, both Jusoh and his son Salim had died. The evidence of the previous sales was led not by the defendant, but by the plaintiff herself to show that for many many years this land had been in her family first in the possession of her father-in-law Jusoh and after his death in the possession of her late husband and finally in her own possession, to support her claim that Abdullah bin Mohamed had indeed sold this land.

With respect I agree with counsel for the plaintiff that even if it is true that Salim had an equitable interest in the land, nevertheless the rule is first come first served, so that whoever first comes to court to seek specific performance will get it, if he proves his case.

In my view, this is a contest between Itam on the one hand and Chik on the other, and we should determine the rights of Itam solely in relation to the rights of Chik. This is not a contest between Itam on the one hand and her husband Salim on the other, and as Salim has died it is not likely that there will ever be a contest between them, and even if there were, we are not in this appeal concerned with that contest. Should such a contest arise, only then will the relative merits of Salim's estate's claim and Itam's claim be in issue and call for a determination.

It is also argued on behalf of the defendant before us that the agreement (Exhibit P2) has been entered into by Mek in her personal capacity and that it cannot therefore bind Abdullah's estate: *Noordin.*[1] This point was not pleaded by the defendant and in my view it is now too late for her to raise it before us.

For the above reasons I would therefore dismiss this appeal.

Ali F.J. concurred.

Raja Azlan Shah F.J.: I agree that the appeal be dismissed for the following reasons.

As indicated by the learned Chief Justice, we are not here concerned with competing priorities between the plaintiff and Salim's estate. The latter could have sued Abdullah bin Mohamed's estate for specific performance of the agreement (Exhibit P3), but they have elected not to do so.

We are here asked to give specific performance of the agreement (Exhibit P2) entered into between the plaintiff in her personal capacity and Mek binti Jusoh as a representative of Abdullah bin Mohamed's estate. Since 1948 the plaintiff had been in possession

of the said land without interruption. From the time she went into occupation she was the equitable owner of the said land. What is required now is to clothe the equitable estate with a legal title. She is entitled to invoke the equitable relief of specific performance. In my opinion the case of *Munah* v. *Fatimah*[2] is a useful analogy. She is also entitled to rely upon her possession of the title deed as a reasonably sufficient protection.

Appeal dismissed.

Solicitors: *Karpal Singh, Wong & Co.; Jayadeva & Zahir.*

PUBLIC PROSECUTOR v. RENGASAMY

[A.Cr.J. (Wan Hamzah J.) May 3, 1974]
[Ipoh — Criminal Appeal No. 47 of 1972]

Evidence Act, ss. 62 and 63 — Carbon copies of cash books — Whether primary or secondary evidence — Charge of criminal breach of trust — Proof of misappropriation — Penal Code s. 409.

The respondent was charged with committing three offences under section 409 of the Penal Code. In the lower court he was acquitted and discharged without his defence being called. According to the statement of grounds of decision of the learned Sessions Court President, the reason for not calling for the defence was that he held that the analysis cash books used in Government Departments for the purpose of recording cash receipts were secondary evidence falling under section 63(b) of the Evidence Act.

The ground submitted by the respondent in the course of this appeal was that there was no evidence of loss to the Government of the sums stated in the charges and alleged to be entrusted to the respondent and therefore the prosecution had failed to prove misappropriation.

Held, dismissing the appeal: (1) carbon copies of the analysis cash books are not secondary evidence under section 63(b) of the Evidence Act as they are documents made by one and the same uniform process as the top copies and therefore they are admissible as primary evidence under section 62;

(2) in the circumstances of this case the prosecution had failed to prove misappropriation.

CRIMINAL APPEAL.

Gunn Chit Tuan (Senior Federal Counsel) for the appellant.

Edgar Joseph Jr. (*S. Thevinthiran* with him) for the respondent.

Wan Hamzah J.: The respondent was tried in the Sessions Court at Ipoh on the following charges: —

"First Charge:

That you between 28th and 29th August, 1969, at the District Police Headquarters, Ipoh, in the District of Kinta, in the State of Perak, being a public servant, namely, Acting Chief Clerk in the office of the District Police Headquarters, Ipoh, and in such capacity, being entrusted with certain property, to wit, cash $229.21 cents, the property of the Royal Malaysia Police, committed criminal breach of trust in respect of the said property and that you have thereby committed an offence punishable under section 409 of the Penal Code.

Second Charge:

That you between 2nd and 3rd September, 1969, at District Police Headquarters, Ipoh, in the District of Kinta, in the state of Perak, being a public servant, namely, Acting Chief Clerk in the office of the District Police Headquarters, Ipoh, and in such capacity, being entrusted with certain property, to wit, cash $47.44 cents, being part of revenue collections on 2nd September, 1969, the property of the Royal Malaysia Police, committed criminal breach of trust in respect of the said property and that you have thereby committed an offence punishable under section 409 of the Penal Code.

Third Charge:

That you between 2nd and 3rd October, 1969, at the District Police Headquarters, Ipoh, in the District of Kinta, in the State of Perak, being a public servant, namely, Acting Chief Clerk, in the office of the District Police Headquarters, Ipoh, and in such capacity being entrusted with certain property, to wit, cash $251.70 cents, being part of revenue collections on 2nd September, 1969, the property of the Royal Malaysia Police, committed criminal breach of trust in respect of the said property and that you have thereby committed an offence punishable under section 409 of the Penal Code."

After the close of the prosecution case the learned President of the Sessions Court decided not to call for the defence and acquitted and discharged the respondent. According to his statement of grounds of decision the reason for not calling for defence was that he held that the analysis cash books (marked for the purpose of identification as P2A, P2B and P2C respectively) are secondary evidence falling under section 63(b) of the Evidence Act since they are carbon copies and therefore inadmissible since no evidence had been adduced under section 65 to render them admissible. I hold that the carbon copies of the analysis cash books are not secondary evidence under section 63(b). I hold that they are primary evidence falling under section 62 (Explanation 2) of the Evidence Act, being documents made by one and the same uniform process as the top copies, and therefore they are admissible as primary evidence under section 62. By looking at the entries in the documents P2A, P2B and P2C one should have no doubt that they are carbon copies. They are entries made in the ordinary course of keeping account of revenue collection in a Government department, and they were made in books of printed forms, and therefore it can reasonably be inferred that each of the carbon copies was made by one and the same uniform process as the respective top copy. It would of course be ideal if the prosecution had produced the top copies instead of the carbon copies.

From his statement of grounds of decision it appears that the learned President did not find any other reason for not calling for the defence. But on behalf of the respondent it was submitted that there were other grounds why the defence should not be called. One of the grounds submitted by counsel for the respondent is that there is no evidence of loss to the Government of the sums stated in the charges and alleged to be entrusted to the respondent and therefore the prosecution has failed to prove misappropriation. I uphold the defence submission on this point. In many cases of criminal breach of trust of Government money, it would be impossible for the prosecution to produce an eye witness who can testify that he saw the accused putting the Government money into his pocket or in any other way misappropriating it or making use of it for his own purpose, simply because no officer entrusted with Government money would be so foolish as to do so in the presence of any person. Probably he would pretend to work in the office till late hours and after the rest of the office staff have left for home he would take away the money and leave the office